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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,) CR15-1723 TUC RCC(DTF)
Plaintiff,)
) **MOTION TO PRECLUDE**
) **RETRIAL ON GROUNDS OF**
v.) **JUDICIAL ESTOPPEL; OR,**
) **ALTERNATIVELY, MOTION TO**
Lonnie Ray Swartz,) **PRECLUDE INCONSISTENT AND**
Defendant.) **CONTRADICTORY THEORIES**
) **OF PROSECUTION**

COMES NOW the Defendant, LONNIE SWARTZ, by and through his counsel undersigned, and pursuant to the Due Process Clause and authorities cited below, moves this Court to preclude the Government from trying Agent Swartz on Manslaughter charges; or, alternatively, preclude the Government from asserting any theories at a retrial that are inconsistent or contradictory with the positions advanced at the original trial.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. FACTS

3 Agent Swartz was tried on a one count indictment charging him with Second
4 Degree Murder, in violation of 18 U.S.C. § 1111. In order to prove that Agent Swartz
5 committed this crime, the Government sought to demonstrate that he killed with malice
6 aforethought, defined as “either deliberately and intentionally or recklessly with extreme
7 disregard for human life.” (Doc. 476 at p. 16.)

8 The Court also instructed the jury on the lesser-included crimes of Voluntary and
9 Involuntary Manslaughter. The Court will recall that the defense objected to giving any
10 instructions on lesser-included offenses, however after the Court indicated it would
11 instruct the jury on Voluntary Manslaughter, undersigned counsel asked the Court to also
12 instruct on Involuntary Manslaughter.

13 The jury was therefore instructed on the elements of Voluntary Manslaughter,
14 which is similar to Second Degree Murder in that the jury must find that Agent Swartz
15 killed Jose Elena Rodriguez “intentionally” or “recklessly with extreme disregard for
16 human life.” However, Voluntary Manslaughter is distinguished from Second Degree
17 Murder when the killing occurs during “a sudden quarrel or heat of passion, caused by
18 adequate provocation.” Further:

19 [h]eat of passion may be provoked by fear, rage, anger, or
20 terror. Provocation, in order to be adequate, must be such as
21 might arouse a reasonable and ordinary person to kill someone.

1 (Doc. 476 at pp. 17-18.) *See* 18 U.S.C. § 1112; Ninth Cir. Model Jury Instr. 8.109.

2 Similarly, Involuntary Manslaughter has among its elements, the requirement that a death
3 occur with “gross negligence,” defined as “wanton or reckless disregard for human life.”

4 (Doc. 476 at pp. 19-20.)
5

6 In the first trial, the Government revealed its theory of the prosecution in the
7 Opening Statement: that Agent Swartz “executed” Jose Rodriguez. Ms. Feldmeier told
8 the jury:
9

10 Ladies and gentlemen, supporting drug traffickers, throwing rocks, that’s
11 not a death penalty offense. But on that day, Lonnie Swartz became the
judge, the jury and the executioner.
12

(Ex. A, p. 4.)
13

14 In the next 16 days of trial, the Government sought to elicit testimony from witness
15 after witness, whether called by the prosecution or defense, that Agent Swartz was indeed
16 an executioner. Mr. Kleindienst carried the Government’s theme through to the closing
17 argument, telling the jury in his closing argument:
18

19
20 There was not the intent to kill in this case by those people throwing
rocks. And we don’t condone what they did. What they did was wrong.
21 But it was not a capital offense. No matter what they did, and no matter
22 how many rocks came over, it was not a capital offense. Jose Antonio did
not deserve to be executed.
23

24 ...
25

26 Whatever Jose Elena did that night, throwing rocks or being there with
rockers, it wasn’t a capital offense.

1 (Ex. B, pp. 12, 34.) Mr. Kleindienst supported the Government's theory with the
2 following references to show that Agent Swartz acted with malice aforethought, and thus
3 was guilty of murder, because:

- 4 – Agent Swartz did not make a split-second decision but, rather, he had time to
5 reflect and he decided to shoot "to send a message to whoever was out there,
6 no more rockings." (Ex. B, p. 21.)
- 7 – [h]e intended to kill Jose. He intended to eliminate him as a person. (Id., p.
8 34.)
- 9 – [f]or whatever reason, he wanted to take care of these rockers. (Id., p. 90.)
- 10 – "He's not god. He can't decide who lives and who dies." P. 90
- 11 – [i]t wasn't a split-second decision. He calmly walked calmly across the
12 street. And he calmly went to the fence. And he fired three rounds. It was
13 not necessary. It was not the last resort. He had other options available to
14 him. (Id., p. 91.)
- 15 – [a]nd for whatever reason that night he wanted to eliminate him as a human
16 being. (Id., p. 93.)

17 The prosecutor also explained the legal concepts to the jury in his rebuttal closing:

- 18 – Malice aforethought only means that he either intended to kill him or he
19 acted with extreme reckless disregard for the life of Jose Elena. That's what

1 second degree murder is. The intent to kill or acting in extreme disregard for
2 the life of Jose Elena. (Id., p. 98.)

- 3 – When you walk across the street and you have the time to reflect on your
4 conduct, and you go to the bollard, and you see someone who may have
5 thrown a rock, that you don't even know is going to hurt anybody, and you
6 shoot, that's an intentional killing, that's second degree murder. (Id., p. 98.)
7 – And if that's not that, it's extreme reckless disregard for the life of that
8 human being. (Id., pp. 98-99.)

9 Moreover, in his rebuttal closing, government's counsel explicitly and unequivocally
10 argued against Voluntary Manslaughter, telling the jury that Agent Swartz did not
11 discharge his firearm during a sudden quarrel or heat of passion caused by provocation.
12 He told the jury that in such a case, the actor still has intent to kill, but “because of heat of
13 passion caused by adequate provocation you kill that person.” (Id. p. 99.) He said that on
14 the contrary, Agent Swartz acted deliberately, coolly, and calmly. (Id.) The prosecutor
15 went on to give an example of Voluntary Manslaughter, as would occur “where you're
16 happily married and you have kids and you think everything is fine, and you come home
17 and you find your spouse in bed with somebody else and you pull out a gun and shoot
18 him.”¹ (Id. at pp. 99-100.)

1 The transcript reads “involuntary” manslaughter but it is clear from the context that the prosecutor was giving an example of “voluntary” manslaughter.

With regard to Involuntary Manslaughter, government's counsel said it "is not an appropriate charge in this case for you to consider as a lesser included offense," explaining the negligence element as akin to a drunk driver who runs a red light and kills somebody. (Ex. B., p. 99.) He argued, "[t]hat's not this case. That's not this case." (Id.)

After 16 days of hearing extensive testimony and evidence, and after another several days of deliberation, the jury unanimously found Agent Swartz not guilty of Second Degree Murder. The jury also was unable to reach a unanimous verdict as to the lesser included offenses (voting 7 to 5 for acquittal). This Court should not permit the Government to re-try Agent Swartz on the lesser crimes it previously argued were not supported by the evidence. Alternatively, the Government should not be permitted to argue theories that are inconsistent with or contradict those advanced at Agent Swartz's first trial. To do so would violate Due Process and Mr. Swartz's constitutional right to a fair trial.

II. LAW

A. *This Court Should Apply the Equitable Remedy of Judicial Estoppel to Preclude a Second Trial of Agent Swartz on Manslaughter Charges*

The doctrine of judicial estoppel is invoked at the court's discretion, to preclude a party from abusing the judicial process by taking inconsistent positions in the same litigation. *Yanez v. United States*, 989 F.2d 323, 326 (9th Cir. 1993). It is an equitable doctrine that is most commonly "applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same

1 proceeding or a prior one.” *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990). Judicial
2 estoppel is a rule that seeks to prevent “intentional self-contradiction...as a means of
3 obtaining unfair advantage.” *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th
4 Cir. 1984) (*quoting Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir.
5 1953)). Most importantly, the policies underlying preclusion of inconsistent positions are
6 “general consideration[s] of the orderly administration of justice and regard for the
7 dignity of judicial proceedings.” *Id.* (citation omitted).

8 In this case, the Government indicted Agent Swartz only for Second Degree
9 Murder, not for Manslaughter. At the end of the trial, the defense objected to the jury
10 receiving instructions on any lesser-included offenses. The government fought hard to
11 obtain a murder conviction of Agent Swartz, but a jury disagreed with the theory of the
12 prosecution. If the jury had not been instructed on the two manslaughter charges, Agent
13 Swartz could not now be tried for manslaughter because jeopardy would have attached by
14 virtue of his acquittal. *United States v. Gooday*, 714 F.2d 80, 82 (9th Cir. 1983) (“[i]f no
15 instructions are given on lesser included offenses ... an acquittal on [a greater] charge
16 necessarily implies an acquittal on all lesser offenses included within that charge. An
17 acquittal on the explicit charge therefore bars subsequent indictment on the implicit lesser
18 included offenses.”).

19 The Government elected a theory of the legal implication of the facts shown by the
20 evidence. The Government has not released any significant new disclosure or identified
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1 new witnesses since the first trial. In other words, the jury will hear the same evidence the
2 government presented previously. This time, however, the Government will argue the
3 evidence leads to a conclusion that is opposite of what it argued in the first trial.
4

5 Prosecutors can exert tremendous influence over the jury, even though they are instructed
6 that arguments of counsel are not evidence. Unlike their “hired gun” counterparts,
7 prosecutors “enjoy unique prestige and power” as representatives of the United States.
8

9 *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). For this reason, government’s counsel
10 is afforded a presumption of credibility in the eyes of the jury that is difficult to attack.

11 The presentation by the Government of an entirely different – contradictory –
12 theory of Agent Swartz’s criminal liability, based on the same facts, offends the judicial
13 process and disregards the dignity of judicial proceedings. *Russell v. Rolfs*, 893 F.2d at
14 1037 (citing 1B Moore’s Federal Practice ¶ .405[8], at 238–42 (2d Ed.1988)). Rather than
15 permit this, this Court should exercise its discretion and authority to grant Agent Swartz
16 equitable relief by precluding his retrial on grounds of judicial estoppel.
17
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19 B. *Inconsistent or Contradictory Theories of Prosecution Offends Due*
20 *Process*

21 The strategic necessities of successive trials should not be the benchmark of
22 fundamental fairness; rather, that is the role of Due Process, which protects an accused
23 from actions that violate “those fundamental conceptions of justice which lie at the base
24 of our civil and political institutions and which define the community’s sense of fair play
25 and decency.” *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (citations omitted).

1 The requirement of “fundamental fairness,” therefore, is a core value “embodied in the
2 Due Process Clause of the Fourteenth Amendment.” *In re Winship*, 397 U.S. 358, 369
3 (1970) (Harlan, J., concurring). Accordingly, barring the prosecution from asserting
4 inconsistent and contradictory legal theories in a successive proceeding involving the
5 same parties and the same evidence, promotes fair enforcement of criminal laws, the
6 fairness of the judicial process, and the integrity of the justice system. Conversely, Agent
7 Swartz will be deprived fundamental fairness if the Government is allowed to present
8 flip-flopping theories about the same alleged crime. This deprivation is exacerbated when
9 the statements are not being made to the same jury, which would otherwise be able to
10 evaluate the credibility of the prosecutors’ different positions as it relates to their own
11 responsibilities to evaluate the evidence and apply the law.

12 Prosecutors have a unique role in the judicial process. They represent the interests
13 of the sovereign, and thus, have a heightened responsibility to ensure that fairness is
14 achieved a defendants’ due process rights are protected. *Berger v. United States*, 295 U.S.
15 78, 88 (1935). If the Government is permitted to theorize and argue to another jury that
16 Agent Swartz indeed shot Jose Rodriguez during sudden quarrel or heat of passion, that
17 inconsistency is improper because one theory is necessarily incorrect. Due Process is
18 violated because the result is a demeaning of the judicial process, with Agent Swartz
19 caught in the cross-hairs.

1 In *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc), *rev'd on other*
2 *grounds*, 523 U.S. 538 (1998), a plurality of the en banc Ninth Circuit held, “it is well
3 established that when no new significant evidence comes to light a prosecutor cannot, in
4 order to convict two defendants and separate trials, offer inconsistent theories of facts
5 regarding the same crime.” 120 F.3d at 1058. Doing so offends Due Process because in
6 one of the trials, the prosecution fell short of its duty to “vindicate truth and to administer
7 justice.” *Id.*

10 *Thompson* and other cases often discuss a prosecutor’s use of false evidence or act
11 in bad faith as a precondition of finding a due process violation based on inconsistent
12 theories in separate trials against separate defendants charged with the same crime. *See*
13 *Nguyen v. Lindsey*, 232 F.3d 1236, 1240 (9th Cir. 2000). The question presented here is
14 somewhat different, because the same defendant is being tried lesser included offenses,
15 but the legal analysis should be similar. The Government argued to the jury that the
16 evidence did not support a conviction for manslaughter. The only way for the
17 Government to obtain a conviction against Agent Swartz now, is to take a 180-degree
18 turn and urge a jury to convict Agent Swartz of that very offense. This is tantamount to
19 bad faith because there is no way to reconcile those contradictory theories on any rational
20 basis.

This Court should preclude the Government from asserting inconsistent or contradictory theories in order to protect Agent Swartz's Due Process Rights to a fundamentally fair trial.

C. The Special Ethical Duties of a Prosecutor Conflict with Presenting Inconsistent or Contradictory Theories

Prosecutors have special ethical duties that arise from their unique positions of power and authority, regardless of their State of licensure. For example, every State has adopted the ABA Model Rules of Professional Conduct,² which include Rule 3.8, “Special Responsibilities of a Prosecutor.” At its core, Rule 3.8 is meant to address the responsibilities of a prosecutor “as a minister of justice and not simply that of an advocate.” Rule 3.8 Comment 1, ABA Model Rules of Professional Conduct (4th ed.). “This responsibility,” the comment continues, “carries with it specific obligations to see that the defendant is accorded procedural justice....” *Id.* The ABA also promulgates Criminal Justice Standards for the Prosecution Function,³ which are aspirational standards intended to be consistent with and supplement the Model Rules. Standard 3-1.1, ABA Criminal Justice Standards for the Prosecution Function (4th ed.). Once again

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html

https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html

these guidelines underscore the primacy of a prosecutor's duty to seek justice within the bounds of law, to serve the public interest, and to act with integrity. *Id.* at Standard 3-1.2.

The preceding sections argue that Agent Swartz's due process rights will be violated if the Government is permitted to advance inconsistent prosecution theories at a second trial. Prosecutors who knowingly adopt inconsistent positions in separate proceedings without adequate justification (i.e. a shift in the evidence presented), know that one of those positions is wrong; they therefore lack a good faith belief in one of the positions. Because procedural justice cannot occur in that environment, doing so is contrary to a prosecutor's ethical duties under Rule 3.8 and the standards noted above.

III. CONCLUSION

For all the foregoing reasons, the Court should apply judicial estoppel to prevent the Government from trying Agent Swartz on Manslaughter charges. Alternatively, the Court should preclude the Government from taking any position, or advancing any argument, that contradicts or is inconsistent with the positions and arguments it made at Agent Swartz's first trial.

Respectfully submitted this 18th day of July, 2018.

LAW OFFICE OF SEAN CHAPMAN, P.C.

BY: s/Sean C. Chapman
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CERTIFICATE OF SERVICE

The undersigned certifies that on July 19, 2018, caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which sent notification to the following:

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